

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs August 1, 2023

**FILED**  
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**STATE OF TENNESSEE v. TIMOTHY MICHAEL CRABTREE**

**Appeal from the Circuit Court for Henry County**  
**No. 40CC1-2018-CR-15993      Donald E. Parish, Judge**

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**No. W2022-01008-CCA-R3-CD**

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The Defendant, Timothy Michael Crabtree, was convicted in the Henry County Circuit Court of aggravated assault and was sentenced as a Range II, multiple offender to ten years in confinement. On appeal, he contends that the evidence is insufficient to support his conviction because the evidence fails to show the victim suffered serious bodily injury and that his sentence is excessive. Upon review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and MATTHEW J. WILSON, JJ., joined.

Jessica F. Butler (on appeal), Assistant Public Defender - Appellate Division, Franklin, Tennessee, and Bruce Griffey (at trial), Paris, Tennessee, for the appellant, Timothy Michael Crabtree.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Neil Thompson, District Attorney General; and Morgan Crocker Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

This case relates to the Defendant's assaulting Nicholaas Peters, the victim, on August 20, 2018. In November 2018, the Henry County Grand Jury indicted the Defendant for attempted second degree murder and aggravated assault causing serious bodily injury. The Defendant went to trial on April 11, 2022.

At trial, the victim testified that the Defendant was a regular customer at his Springville business, Country Junction General Store, and that he knew the Defendant as “Mikey.” The Defendant would come into the store to buy beer. Although the victim did not like for customers to consume alcohol in the store, the store’s license allowed them to do so, and the Defendant sometimes consumed his beer under the store’s covered veranda. The victim said that he felt sorry for the Defendant because the Defendant was unemployed and that he tried to help the Defendant by referring him to people wanting to hire employees.

The victim testified that about a week before the incident in question, the Defendant came into the store and brought his own beer with him. The victim told the Defendant that he could not consume the beer at the store if he had purchased the beer somewhere else. The Defendant was polite and said, “Yes, sir. . . . I’ll be gone very soon. Let me finish this one, sir.” However, the Defendant “would not follow through” and continued drinking beer at the store even though he had purchased the beer elsewhere. The weekend before the assault, the victim told the Defendant, “Look, this is not going to go on.” The Defendant cursed at the victim and said, “No. I have every right to be here.”

The victim testified that his home was next door to the store. On the night of Sunday, August 19, 2018, the Country Junction General Store was open, but the victim was at home. He received a telephone call from his stepdaughter, who was working at the store. She told the victim that she could not “make the drawer tally up,” so the victim walked to the store to help her. Although it was close to midnight, the Defendant was there drinking beer. The victim threatened to call the police, so the Defendant pointed his finger at the victim and said, “If you ever call the cops on me, it won’t be because I’m sitting here drinking or that I’m drunk. It will be because your em-effing body will be laying here dead.” The victim told the Defendant to get off his property and never come back. Although the victim did not think the Defendant would ever return to the store, the Defendant arrived about 8:00 p.m. the next day, just as the victim was preparing to close the store. The victim met the Defendant at the door and asked what he was doing there, and the Defendant replied that he had every right to be there and that he wanted to buy beer. The victim told the Defendant to get off his property and that the store was closed. The Defendant started cursing at the victim, so the victim closed the door.

The victim testified that he did not lock the door and that he began restocking the store. He heard someone come inside and heard the Defendant say, “I’m going to kill you, you em-effer.” The victim turned to look at the Defendant, and the Defendant hit the victim. The victim stated:

I guess I went out, and I don’t remember much after that, other than that I was on the floor feeling punched. My head was constantly going like this

(indicating), and I thought I was going to die. I thought, "This is it. This is the end of my life."

The victim did not feel any pain but heard his wife tell him to "get up." He said that he "sort of came to" and that he tried to figure out what had happened. The victim saw that his wife had the Defendant "in what they call a full nelson, with . . . her hands behind his neck," so the victim got up and looked for something he could use to hit the Defendant in case the Defendant broke free from her. The victim said that he walked around the store but that he was "too out of it to really find anything." The State asked him to explain, and he stated:

I don't know how long I was out, but I was -- I was disoriented. I couldn't see well because blood was -- blood was all over my eyes. And I don't know. I just didn't know what to do. But I got up. I didn't really sense that he would get up, but then I realized he might break free, and I felt fear for my wife, for my stepdaughter. And, yep, that's -- I don't -- everything is pieced together on that night.

The victim testified that the police and an ambulance arrived. The ambulance transported him to a local hospital, which then transferred him to Vanderbilt University Medical Center. Medical staff at Vanderbilt cleaned his wounds, and a plastic surgeon told him that she was going to repair tissue that had been torn around his left eye. The victim was in the hospital "for the better part of a week," and he did not have vision in his left eye at the time of discharge. He had to wear an eyepatch, could not drive, and ended up having about twelve surgeries to keep from losing his sight in his eye. After one of the surgeries, the victim had an allergic reaction that caused his throat to swell shut, and he almost died.

The State asked if the victim still had to wear the eyepatch, and he stated, "Sometimes, I will, because it's not consistent. Like, if I wanted to -- if I read the clock, I have to close the eye because they don't correspond. So, I close one eye, and I can tell where the hands are." He said that he used to wear contacts and had cataract surgery at least three years prior to the assault but that his sight before the assault was "good in both eyes." The State asked him to describe his vision at the time of trial, and he responded, "The eye gives me good peripheral vision, and I can focus on people, and it doesn't bother me anymore, but I've had to learn how to do that." The victim said that he still had "severe pain" in his left eye sometimes and that the eye would suddenly "ache in the morning." He stated that he had "learned how to live" with his vision problems, adding "I don't think I'm going to ever lose the vision in that eye unless something traumatic happens to it. But it's not a [100%], but it's there. I'm glad I have the vision in that eye yet."

The victim testified that the store had a video surveillance system with multiple camera angles. After the incident, a police officer came to the store and obtained video of the assault.

On cross-examination, the victim acknowledged that he and the Defendant had a disagreement over money sometime prior to August 20, 2018. He explained that he and another man were digging a well, that the Defendant offered to help them, and that he allowed the Defendant to do so. Afterward, the Defendant wanted the victim to pay the Defendant. The victim refused because he had not hired the Defendant for the job.

The victim testified that he walked to the ambulance after the assault. Defense counsel asked if he was sure he lost consciousness during the assault, and he answered, "I'm not sure. . . . I was probably disoriented. Probably not unconscious." The victim said that he drove to the Defendant's trial and that he did not wear an eyepatch during the drive. He then stated:

I think I have learned to disregard what I see in that eye, and you learn to adapt, I guess. When it first happens, you have to close one eye just to get a frame of reference, but now, you disregard -- I disregard what I see in that eye more than what I see in my right eye, and the two don't conflict. They don't send a conflicting message to me.

The trial court allowed defense counsel to approach the victim so that defense counsel could take a close look at the victim's face, and defense counsel asked the victim's age. The victim said that he was seventy-one years old. Defense counsel commented that "[y]ou look good for seventy-one" and that "I can't tell if there's any scars left there." The victim responded, "Yeah. It's in the eyebrow, so it's hidden. I'm amazed how good they did."

Judy Peters, the victim's wife, testified that she knew the Defendant because he was a regular customer at the store. On the night of the assault, the Defendant arrived at closing time, and the victim met him at the door. Mrs. Peters said that the Defendant and the victim had "a confrontation" but that she was in the kitchen and did not hear what they said. Mrs. Peters' young granddaughter started crying, so Mrs. Peters left the kitchen and picked up the child. Mrs. Peters told the Defendant to leave the store and told the victim not to say anything else to the Defendant. Mrs. Peters carried her granddaughter to Mrs. Peters' home next door and then returned to the store.

Mrs. Peters testified that when she entered the store, the victim was on the floor, and the Defendant was on top of him. The Defendant was hitting the victim and had his arm on the victim's neck, choking the victim. Mrs. Peters ran to the Defendant. She said

that as he raised up to hit the victim again, she put the Defendant in a headlock between her legs and put her weight on him to hold him down. She told the victim to get off the floor, pulled her cellular telephone out of her pocket, and called 911. Mrs. Peters told the dispatcher that the victim needed an ambulance because blood was “everywhere.”

Mrs. Peters testified that it took the victim “[t]wo or three minutes maybe” to get up, that he “stumbled over to the table,” and that “blood was just falling from his face.” The Defendant was still trying to get to the victim and told Mrs. Peters to “let him up so he could finish what he came to do.” The victim sat at the table, but Mrs. Peters kept yelling for him to get out of the store. The victim left through the kitchen, so Mrs. Peters released the Defendant. However, she locked the door so the Defendant could not leave and made him sit in a chair while they waited for the police.

Mrs. Peters testified that when the police arrived, the Defendant “ran and grabbed him a beer, . . . and he turned up a beer and drank it.” The Defendant told the police that “[i]t’s me,” and the officers arrested him. The victim, who had been prescribed blood thinner medication prior to the assault, was bleeding heavily, so an ambulance transported him to the local hospital. Mrs. Peters took photographs of the victim’s injuries at the hospital, and she identified the photographs for the jury. She said the Defendant knew prior to hitting the victim that the victim had a heart condition and was taking blood thinner medication because she would talk with the Defendant when he was a customer in the store. Mrs. Peters stated that after the assault, one of the victim’s eyes was “set back a little bit further than the other one” and that she noticed he had difficulty with depth perception while he was driving.

On cross-examination, Mrs. Peters testified that she did not think the victim lost consciousness in the store. The ambulance took him to Henry County Medical Center, and Mrs. Peters was with him before he was transferred to Vanderbilt. She said the victim did not lose consciousness in the hospital.

Sergeant Blake Jenkins of the Henry County Sheriff’s Office (“HCSO”) testified that he was dispatched to Country Junction General Store about 8:00 p.m. due to a report that a subject had been beaten and was bleeding. When he and other officers arrived, the victim was sitting on the porch of his home next to the store, and Sergeant Jenkins could see blood on his face. The victim told the officers that his wife and the Defendant were still inside the store, so the officers went to the store. The Defendant came to the officers with his hands up, and Sergeant Jenkins detained him until Sergeant Jenkins could figure out what had happened. The Defendant was intoxicated but did not give Sergeant Jenkins any trouble. The Defendant told Sergeant Jenkins that “he was tired of being disrespected by the victim, and that’s when he had started hitting him.” Sergeant Jenkins identified photographs of the Defendant’s hands, showing injuries on the backs of his hands and

blood on his knuckles. Sergeant Jenkins also identified photographs he took of the victim while the victim was in an ambulance.

Adam Jenkins testified that he was a lieutenant investigator with the HCSO. On the morning after the beating, he went to the Country Junction General Store and obtained the store's surveillance video from Mrs. Peters. The victim was at Vanderbilt Medical Center. Mr. Jenkins identified the video, and the State played the video for the jury. The video showed that at 8:00 p.m., the victim was sweeping the floor while his young granddaughter was running around the store. At 8:01:44 p.m., the victim suddenly picked up a cordless telephone. The Defendant came into view and grabbed the victim from behind. They struggled, and the Defendant released the victim. The victim pointed his finger at the Defendant, and the Defendant moved toward the victim and pulled back his fist like he was going to hit the victim. Instead, the Defendant argued with the victim and walked away from the victim while the victim's wife left the store with their granddaughter. The victim began talking on the telephone, and the Defendant suddenly ran toward the victim and punched him on the left side of his face. The Defendant pushed the victim to the floor and continued punching the left side of his head and face. The victim's wife came into the store and pulled the Defendant off the victim. The victim staggered to his feet and sat down at a table. Blood was on the floor and was on the victim's face, hands, and shirt. After the State played the video, the State rested its case-in-chief.

The Defendant testified that he was thirty-eight years old. On August 20, 2018, he went to the victim's store about 8:00 p.m. The victim "confronted" him, and they "got into an altercation." The Defendant described the altercation as "a little argument, inside the store." He said that the incident "got physical" and that he hit the victim three or four times. After the incident, the victim "left the store several times and came back." The Defendant said that he talked to the victim after the assault and that the victim did not have any visible injuries.

The Defendant testified that he thought "foul play" was involved in this case because the victim's records from Henry County Medical Center said the victim was "uninjured." The Defendant stated that the victim reported having normal vision when he was admitted to the hospital but that "now he is stating that he's suffering from loss of vision." The Defendant said he did not understand how the victim could claim vision loss because "I never did even hurt the gentleman."

On cross-examination, the Defendant testified that prior to the altercation, he had been going to the Country Junction General Store regularly. He said that he did not remember talking with the victim the night before the assault; that he came to the store on August 20, 2018, "to get some beer and go back to my family"; and that the victim "picked a fight with me that day." He said he did not remember telling the victim that he was going

to kill the victim or telling Mrs. Peters that that he should be allowed to finish what he started. The Defendant stated that although the victim could be seen bleeding in the video, there was no blood in the store and no blood where the victim was sitting at the table. The Defendant claimed the video was “inaccurate” because he “did not cause any bodily harm” to the victim. He acknowledged, though, that the video accurately showed the victim’s wife holding him down. The Defendant stated that after the assault, he apologized to the victim. The Defendant said he thought the victim was lying about the victim’s vision problems. The Defendant admitted hitting the victim and said he was guilty of assault, not aggravated assault.

The State called the victim in rebuttal. The victim testified that the Defendant never apologized to him.

During closing arguments, the State asserted that, relevant to the charge of aggravated assault, the victim suffered serious bodily injury due to the ongoing pain in his left eye and “significant and long-lasting impairment to vision.” Defense counsel argued that although the victim suffered pain, he did not suffer the extreme physical pain necessary to qualify as serious bodily injury. Defense counsel also argued that the State failed to show the victim suffered protracted loss or substantial impairment of vision. On rebuttal, the State argued that “the testimony wasn’t that clear on the unconsciousness” but that the “substantial impairment” and scarring to the victim’s eye could be serious bodily injury.

During deliberations, the jurors requested to watch the surveillance video again. The trial court had them return to the courtroom, the State played the video, and the jury returned to the jury room to continue deliberating. Subsequently, the jury sent a note to the trial court, asking “What is the definition of ‘protracted?’” The trial court, with the consent of the parties, sent the following definitions from the Oxford Dictionary to the jury: “lasting for a long time or longer than expected or usual” and “prolonged.” About thirty minutes later, the jury announced that it had reached a verdict. The jurors returned to the courtroom and found the Defendant not guilty of attempted second degree murder but guilty as charged in the indictment of aggravated assault.

## ANALYSIS

### **I. Sufficiency of the Evidence**

The Defendant contends that the evidence is insufficient to support his conviction because the State failed to show the victim suffered serious bodily injury. The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

Relevant to this case, a person commits aggravated assault who intentionally or knowingly commits an assault, and the assault results in serious bodily injury. *Id.* § 39-13-102(a)(1)(A)(i). Assault occurs when a person intentionally, knowingly, or recklessly causes bodily injury. *Id.* § 39-13-101(a)(1). “‘Bodily injury’ includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]” *Id.* § 39-11-106(a)(3). Serious bodily injury is defined as a bodily injury that involves:

- (A) A substantial risk of death;
- (B) Protracted unconsciousness;
- (C) Extreme physical pain;
- (D) Protracted or obvious disfigurement;

(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty;

*Id.* § 39-11-106(a)(37). “While the phrase ‘serious bodily injury,’ an essential element of the offense of aggravated assault, is not susceptible to precise legal definition, it must describe an injury of a greater and more serious character than that involved in a simple assault.” *State v. Barnes*, 954 S.W.2d 760, 765 (Tenn. Crim. App. 1997)). “The distinction between ‘bodily injury’ and ‘serious bodily injury’ is generally a question of fact for the jury and not one of law.” *Id.* at 765-66.

Here, the record shows that the State relied on extreme physical pain; protracted or obvious disfigurement; and protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty to support the element of serious bodily injury. The Defendant concedes that the injury to the victim’s left eye meets the statutory definition of “bodily injury” and, therefore, that the evidence is sufficient to show he committed simple assault. However, he contends that the proof does not show the victim suffered serious bodily injury because the victim was able to stand and walk on his own after the assault, the victim testified that he did not lose consciousness or feel any pain, the victim was able to drive himself to the trial and do so without an eyepatch or the assistance of his wife, and the victim never testified that his impaired vision hindered his daily activities except for driving. The Defendant notes that the State failed to present any medical records to prove the victim’s injuries or impaired vision and that the only evidence of either came in the form of lay opinion testimony from the victim and his wife.

First, although the victim testified that he did not feel any pain during the beating, he also testified that he sometimes experienced “severe” pain in his left eye at the time of trial. This court has held that the subjective nature of pain is a fact to be determined by the trier of fact. *State v. Dedmon*, No. M2005-00762-CCA-R3-CD, 2006 WL 448653, at \*5 (Tenn. Crim. App. Feb. 23, 2006). Second, the victim testified that he had a scar from the assault in his eyebrow, and a scar is sufficient to support the element of serious bodily injury. *State v. Darwin*, No. M2018-01669-CCA-R3-CD, 2019 WL 4440220, at \*4 (Tenn. Crim. App. Sept. 17, 2019) (citing *State v. Matthews*, No. M2010-00647-CCA-R3-CD, 2012 WL 5378046, at \*4 (Tenn. Crim. App. Oct. 31, 2012); *State v. Capps*, No. M2010-02143-CCA-R3-CD, 2012 WL 3800848, at \*7 (Tenn. Crim. App. Sept. 4, 2012); *State v. Forster*, No. M2002-0008-CCA-R3-CD, 2011 WL 1431980, at \*10 (Tenn. Crim. App. Apr. 12, 2011)).

Stronger, though, is the State’s argument that the victim suffered protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty. In *State v. Porter*, No. M2019-01377-CCA-R3-CD, 2020 WL 5914625, at \*1 (Tenn. Crim. App.

Oct. 6, 2020), the defendant and the victim, who was his girlfriend, got into an argument while driving. The defendant stopped the vehicle; dragged the victim out by her feet, causing her to hit her head on the door frame; and began kicking her in the face while she was lying on the ground. *Id.*, The victim ““blacked out”” and woke up alone in the middle of the road. *Id.* She walked, barefoot, to a McDonald’s. *Id.* Her left eye was swollen shut, she was in pain, and she felt dizzy. *Id.* At trial, the victim testified that she still experienced pain in her face, that her eye still did not completely open, and that she still experienced ““white flashes and black spots”” in her vision. *Id.* The jury convicted the defendant of aggravated assault causing serious bodily injury. *See id.* at \*4. On appeal, this court found that the victim’s ongoing eye issues were sufficient to show that she suffered substantial impairment of a function of a bodily member. *Id.* at \*6.

Taken in the light most favorable to the State, the evidence in this case shows that the Defendant suddenly attacked the victim and repeatedly punched him in the head and face. The video shows that the Defendant lied when he testified at trial that he hit the victim three or four times and that no blood was in the store. By our count, the Defendant punched the victim at least sixteen times in just thirteen seconds. Moreover, the color video clearly shows blood on the floor. The Defendant also lied when he testified that no visible injuries were on the victim. The video shows blood all over the victim’s face and hands, and the photographs taken of him in the ambulance show his left eye was purple and completely swollen shut. Additionally, the photographs show what appear to be two gashes on his face: one in his left eyebrow and the other above his left eyebrow. In addition to the video of the assault and the photographs of the victim’s injuries, the victim testified that he spent almost a week in the hospital, that a plastic surgeon repaired torn tissue around his left eye, and that he had about twelve surgeries to keep from losing his vision in his eye. The victim said that he still suffered vision problems and that the vision in his left eye no longer corresponded with the vision in his right eye. Although the victim said that he mostly had learned to adapt to the changes in his vision, he also said that he still had to close one eye in order to perform certain tasks such as reading the hands on a clock and that his vision was not “100%.” The victim’s wife confirmed that he still suffered vision problems, testifying that he had difficulty with depth perception when driving. We note that while medical records certainly can be helpful in showing that a victim suffered serious bodily injury, medical records are not required to corroborate a victim’s claims of serious bodily injury. *See Darwin*, No. M2018-01669-CCA-R3-CD, 2019 WL 4440220, at \*3 (citing as examples *State v. Vaughn*, No. W2016-00131-CCA-R3-CD, 2016 WL 7102748, at \*7, *app. granted and case remanded on other grounds* (Tenn. Nov. 17, 2017); *State v. Beauregard*, No. M2012-02312-CCA-R3-CD, 2013 WL 6047026, at \*15 (Tenn. Crim. App. Nov. 14, 2013)). Therefore, as in *Porter*, we conclude that the evidence in this case is sufficient to show that the victim suffered substantial impairment of a function of a bodily member. Accordingly, the evidence is sufficient to support his conviction of aggravated assault.

## II. Excessive Sentence

The Defendant claims that his sentence is excessive because the trial court misapplied two enhancement factors and ignored one mitigating factor when it sentenced him to ten years in confinement. The State argues that even if the trial court erred, the Defendant's ten-year sentence is appropriate in this case. We agree with the State.

At sentencing, the victim testified that the Defendant "sucker punched" him and that his wife saved his life. He stated that the Defendant's repeated blows to his left eye "dislodged" the lens inside the eye, that the Defendant meant to kill him, and that he was disappointed the jury did not convict the Defendant of attempted second degree murder. The victim said that he was not the Defendant's first victim and that he was convinced the Defendant would hurt someone else. The victim stated that the Defendant was not remorseful and that the Defendant thought he was being treated unfairly anytime the justice system punished him for his actions. The victim said that he used to hate the Defendant for beating him but that "today I'm glad I can forgive him, and I don't have to carry that with me." The State asked the victim to summarize his injuries again for the trial court, and the victim stated that the bones around his eye were broken during the assault, that doctors had to remove the lens from his eye, and that he probably would need additional surgeries. He said the Defendant needed help "to get over a hair trigger."

The State introduced the Defendant's presentence report into evidence. The report showed that the Defendant was single with no children. In the report, the Defendant stated that he dropped out of high school in the ninth grade but obtained his GED and that he began consuming alcohol when he was fourteen years old. The Defendant also stated that he had been diagnosed with "depression/anti-social issues" and that he had been subjected to three mental competency evaluations, two of which pertained to this case. He did not report any physical health issues. According to the report, the Defendant completed the Cage Your Rage and the Life Without a Crutch programs in 2009. Regarding employment, the report showed that the Defendant was a sawmill worker and cabinet maker for Henry County Hardwoods in 2017, that he sewed drapes and curtains for Custom Interiors from the fall of 2017 to early 2018, and that he was a warehouse worker for McCarney Produce for four weeks in 2018. The report stated that, according to the Defendant's mother, he spent many years in the Tennessee Department of Correction. Prior to his incarceration, he worked at a factory in Milan, Tennessee. The report showed that the Defendant committed voluntary manslaughter when he was twenty-three years old; aggravated assault and disorderly conduct when he was twenty-two years old; assault and possession of drug paraphernalia when he was nineteen years old; and traffic offenses and drug possession when he was eighteen years old. Additionally, he had prior convictions for leaving the scene of an accident, fishing and driving without a license, various traffic offenses, and spotlighting deer. He also violated probation.

The trial court found that the Defendant was a Range II, multiple offender and that the following enhancement factors applied to his convictions: (1), that the Defendant had “a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range”; (5), that the Defendant treated the victim with exceptional cruelty during the commission of the offense because the video showed that “it was just a brutal beating”; and (6), that the personal injuries inflicted upon the victim were particularly great. *See* Tenn. Code Ann. § 40-35-114(1), (5), (6). The court found that no mitigating factors were applicable.

Addressing alternative sentencing, the trial court considered the Defendant’s physical and mental condition; his social history; the facts and circumstances of the offense; the nature and circumstances of the criminal conduct; the Defendant’s prior criminal history; the previous actions and character of the Defendant; whether or not the Defendant might reasonably be expected to be rehabilitated; whether or not it reasonably appeared the Defendant would abide by the terms of probation; whether or not the interests of society being protected from further future criminal conduct were great; whether or not measures less restrictive than confinement frequently or recently had been applied unsuccessfully to the Defendant; whether any probation would unduly depreciate the seriousness of the offense; the need for deterrence; and whether or not the offense was particularly enormous, gross, or heinous. The trial court found that the Defendant’s physical condition was good but that every remaining factor weighed against alternative sentencing. Notably, the trial court found that that the Defendant’s mental condition was poor because he did not appear to be able to control his emotions or understand the consequences of his actions; that this case involved an “unprovoked attack” and was “egregious”; that the Defendant had a “significant” criminal history that involved harm to others; that the Defendant did not have a good potential for rehabilitation; that any sentence other than confinement would “certainly depreciate” the seriousness of the offense; and that the nature of the offense was “certainly enormous.”

At that point, the trial court sentenced the Defendant to ten years in confinement and stated, “The [c]ourt notes that that’s the maximum that it can impose under law. If the [c]ourt could impose more, Mr. Crabtree, I would be inclined to do so.” The trial court stated that it was requesting, on the record, that the Tennessee Department of Correction “exercise great care as it considers the matter of parole” and that “the public use extreme caution in dealing with Mr. Crabtree going forward. He has demonstrated a propensity for physical violence and the [c]ourt considers him to be a dangerous man.”

This court reviews the length, range, and manner of service imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). In determining a defendant’s sentence, the trial court is to consider the following factors: (1) the evidence, if any, received at the trial and

the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the Defendant in his own behalf; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* Tenn. Code Ann. § 40-35-210(b); *see also Bise*, 380 S.W.3d at 697-98. The burden is on the Defendant to demonstrate the impropriety of his sentence. *See* Tenn. Code Ann. § 40-35-401, Sent’g Com’n Cmts.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

*Id.* § 40-35-210(c).

Although the trial court should consider enhancement and mitigating factors, the statutory factors are advisory only. *See id.* § 40-35-114; *see also Bise*, 380 S.W.3d at 701; *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). Our supreme court has stated that “a trial court’s weighing of various mitigating and enhancement factors [is] left to the trial court’s sound discretion.” *Carter*, 254 S.W.3d at 345. In other words, “the trial court is free to select any sentence within the applicable range so long as the length of the sentence is ‘consistent with the purposes and principles of [the Sentencing Act].’” *Id.* at 343 (quoting Tenn. Code Ann. § 40-35-210(d)). Appellate courts are “bound by a trial court’s decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act.” *Id.* at 346.

Initially, we note that the Defendant contends we should review the length of his sentence de novo due to the trial court’s multiple sentencing errors. As we will discuss below, though, the trial court only misapplied one enhancement factor. Therefore, the *Bise* standard of review is appropriate.

First, the Defendant claims that the trial court erred by applying enhancement factor (5), that he treated the victim with exceptional cruelty, because the proof does not show that his actions went well-beyond what was required to prove serious bodily injury. We disagree with the Defendant. The enhancement factor for exceptional cruelty is usually applied “in cases of abuse or torture.” *State v. Williams*, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1955). “It is well established that proper application of enhancement factor (5) requires a finding of cruelty under the statute ‘over and above’ what is required to sustain a conviction for an offense.” *State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001) (quoting *State v. Embry*, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995)). Whether a defendant has treated a victim with exceptional cruelty is “a matter of degree.” *State v. Moore*, No. 02C01-9306-CC-00126, 1994 WL 245481, at \*2 (Tenn. Crim. App. June 8, 1994).

Here, the trial court described the assault as a “brutal beating” and “egregious.” As stated previously, the video shows the Defendant hitting the left side of the victim’s head and face at least sixteen times in rapid succession. As noted by the State in its brief, this court has held that a defendant’s hitting a victim on the head one time with a metal pipe supported the defendant’s conviction of aggravated assault but that the defendant’s hitting the victim a second time, after the victim was incapacitated, supported application of enhancement factor (5). Similarly, the victim in this case testified that he “went out” after the Defendant’s first punch but that he then felt himself being punched repeatedly by the Defendant. The video of the beating and the photographs of the victim’s bloody and battered face after the beating are disturbing. The trial court determined that the Defendant’s conduct went beyond that necessary to sustain an aggravated assault conviction, and the record supports that determination.

Next, the Defendant contends, and the State concedes, that the trial court misapplied enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great. An enhancement factor cannot be an essential element of the offense. *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). Therefore, a trial court cannot use enhancement factor (6) to enhance a defendant’s sentence for a conviction of aggravated assault causing serious bodily injury. *State v. Pitts*, No. M2021-01334-CCA-R3-CD, 2022 WL 17097248, at \*5 (Tenn. Crim. App. Nov. 22, 2022). Accordingly, the trial court erred by applying this enhancement factor.

Finally, the Defendant claims that the trial court erred by failing to apply mitigating factor (8), that he was “suffering from a mental or physical condition that significantly reduced [his] culpability for the offense.” Tenn. Code Ann. § 40-35-113(8). The Defendant asserts that mitigating factor (8) was applicable because according to his presentence report, he had been diagnosed with “depression/anti-social issues” and had two mental competency evaluations related to this case. However, the Defendant did not raise the applicability of mitigating factor (8) in the trial court, and issues raised for the first time

on appeal are waived. *See* Tenn. R. App. P. 36(a); *State v. Johnson*, 970 S.W.2d 500 (Tenn. Crim. App. 1996). In any event, evidence that the Defendant suffered from depression or anti-social issues came from the Defendant. Additionally, nothing in the record shows that those issues “significantly” reduced his culpability for beating the victim. Therefore, the trial court did not err by not applying mitigating factor (8) to the Defendant’s conviction.

In sum, the trial court misapplied enhancement factor (6) but properly applied enhancement (5). The Defendant does not take issue with the trial court’s application of enhancement factor (1). Our supreme court has explained that a trial court’s “misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed. . . . So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld.” *Bise*, 380 S.W.3d at 706. Thus, we conclude that the trial court did not abuse its discretion by imposing a ten-year sentence.

### **CONCLUSION**

Based upon our review, we affirm the judgment of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE